

EXHIBIT 5

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SEALED PROCEEDINGS

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PATRICK CALHOUN, ET AL., ON CASE CV-20-05146 YGR (SVK)
BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED, SAN JOSE, CALIFORNIA

PLAINTIFFS, JANUARY 10, 2023
V.

GOOGLE LLC,

DEFENDANT.

SEALED PAGES 1 - 29

COPY

TRANSCRIPT OF SEALED ZOOM PROCEEDINGS
BEFORE THE HONORABLE SUSAN VAN KEULEN
UNITED STATES MAGISTRATE JUDGE

A-P-P-E-A-R-A-N-C-E-S

FOR THE PLAINTIFFS: DICELLO LEVITT GUTZLER LLC
BY: DAVID A. STRAITE
ONE GRAND CENTRAL PLACE
60 EAST 42ND STREET, SUITE 2400
NEW YORK, NEW YORK 10165

SIMMONS HANLY CONROY
BY: AN V. TRUONG
JASON "JAY" BARNES
112 MADISON AVENUE, 7TH FLOOR
NEW YORK, NEW YORK 10016

BLEICHMAR FONTI & AULD LLP
BY: ANGELICA ORNELAS
555 12TH STREET, SUITE 1600
OAKLAND, CALIFORNIA 94607

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,
TRANSCRIPT PRODUCED WITH COMPUTER.

A P P E A R A N C E S: (CONT'D)

FOR THE DEFENDANT:

QUINN EMANUEL URQUHART AND
SULLIVAN, LLP

BY: ANDREW H. SCHAPIRO
191 N. UPPER WACKER DRIVE
SUITE 2700
CHICAGO, ILLINOIS 60606

BY: DONALD SETH FORTENBERY
JOSEF T. ANSORGE
51 MADISON AVENUE, 22ND FLOOR
NEW YORK, NEW YORK 10010

BY: STEPHEN ANDREW BROOME
VIOLA TREBICKA
865 S. FIGUEROA STREET
10TH FLOOR
LOS ANGELES, CALIFORNIA 90017

BY: XI (TRACY) GAO
1300 I STREET NW, SUITE 900
WASHINGTON, DC 20005

ALSO PRESENT:

GOOGLE LLC
BY: MATTHEW GUBIOTTI
TONI BAKER

1 SAN JOSE, CALIFORNIA

JANUARY 10, 2023

2 P R O C E E D I N G S

09:57AM 3 (COURT CONVENED AT 11:13 A.M.)

11:13AM 4 THE COURT: ALL RIGHT. MS. FANTHORPE, IF YOU'LL
11:13AM 5 CALL THE NEXT MATTER, PLEASE.

11:13AM 6 THE CLERK: YES. CALLING SEALED HEARING IN CASE
11:14AM 7 20-CV-5146, CALHOUN, ET AL., VERSUS GOOGLE LLC.

11:14AM 8 COUNSEL, PLEASE IDENTIFY YOURSELVES FOR THE RECORD
11:14AM 9 BEGINNING WITH THE PLAINTIFF.

11:14AM 10 MR. STRAITE: GOOD MORNING, YOUR HONOR.
11:14AM 11 DAVID STRAITE FROM THE DICELLO LEVITT GUTZLER FOR
11:14AM 12 PLAINTIFFS. GOOD MORNING.

11:14AM 13 JOINING ME TODAY ARE MY COLLEAGUES AN TRUONG, SIMMONS
11:14AM 14 HANLY CONROY; AND ALSO JAY BARNES, SIMMONS HANLY CONROY; AND
11:14AM 15 ANGELICA ORNELAS FROM BLEICHMAR FONTI & AULD.

11:14AM 16 THE COURT: EXCELLENT.

11:14AM 17 WHERE IS MS. ORNELAS? I SAW HER NAME A MOMENT AGO. THERE
11:14AM 18 SHE IS. EXCELLENT. THANK YOU.

11:14AM 19 WELCOME BACK EVERYBODY.

11:14AM 20 AND FOR GOOGLE TODAY?

11:14AM 21 MR. SCHAPIRO: HELLO, YOUR HONOR.

11:14AM 22 ANDREW SCHAPIRO FROM QUINN EMANUEL FOR GOOGLE JOINED BY
11:14AM 23 VIOLA TREBICKA, JOSEF ANSORGE, TRACY GAO, AND SETH FORTENBERY,
11:14AM 24 AND STEPHEN BROOME FROM OUR FIRM.

11:14AM 25 AND ALSO FROM GOOGLE, MATTHEW GUBIOTTI AND TONI BAKER.

11:15AM 1 YOUR HONOR, IF SUDDENLY YOU SEE ME TURN OFF MY SCREEN AND
11:15AM 2 REAPPEAR IN A DIFFERENT ROOM, IT IS BECAUSE IT SEEMS LIKE THE
11:15AM 3 WI-FI IS OCCASIONALLY A LITTLE WEAK IN THE CONFERENCE ROOM
11:15AM 4 WHERE I AM AND THAT JUST MEANS I'VE RUN OVER TO ANOTHER
11:15AM 5 CONFERENCE ROOM FOR A SECOND.

11:15AM 6 THE COURT: YES. YOU WERE BREAKING UP SLIGHTLY ON
11:15AM 7 THE APPEARANCES, BUT WE KNOW THEM ALL BY HEART, SO THAT'S OKAY.

11:15AM 8 THANK YOU, MR. SCHAPIRO.

11:15AM 9 ALL RIGHT. THIS HEARING IS UNDER SEAL. HOWEVER, I WILL
11:15AM 10 ORDER THAT THE TRANSCRIPT CAN BE RELEASED TO THE PARTIES AS
11:15AM 11 SOON AS IT IS AVAILABLE FOLLOWING THESE PROCEEDINGS.

11:15AM 12 WE ARE ON TODAY INITIALLY FOR GOOGLE'S -- WELL, INITIALLY
11:15AM 13 BECAUSE GOOGLE FILED A MOTION FOR RELIEF FROM THE
11:15AM 14 PRESERVATION ORDER.

11:15AM 15 THEN THERE WAS JUDGE GONZALEZ ROGERS ISSUED A SUMMARY
11:16AM 16 JUDGMENT ORDER TERMINATING THE CASE. THAT HAS BEEN APPEALED TO
11:16AM 17 THE NINTH CIRCUIT, WHICH RAISES THE FIRST QUESTION BEFORE US
11:16AM 18 TODAY WHICH IS WHETHER THIS COURT HAS JURISDICTION TO HEAR THE
11:16AM 19 MOTION.

11:16AM 20 THE ORIGINAL MOTION ALSO WAS SUPPLEMENTED. FOLLOWING THE
11:16AM 21 SUMMARY JUDGMENT ORDER I ASKED FOR BRIEFING WITH REGARDS TO THE
11:16AM 22 IMPACT OF THE ORDER ON THE PRESERVATION PLAN, AND IN THAT
11:16AM 23 SUBSEQUENT BRIEFING GOOGLE ASKED FOR FURTHER RELIEF OF A
11:16AM 24 REQUEST THAT IT NOT HAVE TO PRESERVE ANY ADDITIONAL DATA GOING
11:16AM 25 FORWARD AND NOT CONTINUE TO PRESERVE THE DATA COLLECTED SO FAR.

11:16AM 1 SO -- OR IF THAT WAS THE CASE, THEN HAVE THE PLAINTIFFS
11:17AM 2 PAY THE COST OF RETAINING THAT DATA, AND THEN THAT, OBVIOUSLY
11:17AM 3 THAT REQUEST RAISED THE ISSUES OF -- OR BROUGHT TO A HEAD I
11:17AM 4 SHOULD SAY, THE ISSUES OF WHETHER OR NOT THIS COURT HAS
11:17AM 5 JURISDICTION TO HEAR ANY OF THE ISSUES RAISED BY GOOGLE.

11:17AM 6 SO I THINK THAT'S THE GENERAL LANDSCAPE.

11:17AM 7 LET ME GIVE YOU MY VIEWS AT THIS POINT, AND THEN WE WILL
11:17AM 8 FIND OUR WAY FORWARD.

11:17AM 9 THE QUESTION AS TO WHETHER OR NOT I HAVE JURISDICTION IS A
11:17AM 10 QUESTION OF WHETHER THE ISSUES BEFORE ME ARISING OUT OF THE
11:17AM 11 PRESERVATION PLAN ARE RELATED TO ISSUES ON APPEAL. WITH MANY
11:17AM 12 ASPECTS OF THIS CASE, IT'S AN INTERESTING QUESTION.

11:17AM 13 WITH REGARDS TO GOOGLE'S REQUEST FOLLOWING THE SUMMARY
11:18AM 14 JUDGMENT ORDER THAT IT BE PERMITTED TO CEASE ITS PRESERVATION
11:18AM 15 EFFORTS UNDER THE PRESERVATION ORDER AND DELETE THE DATA
11:18AM 16 PRESERVED THUS FAR, I THINK THAT THAT MAY PRESENT SUBSTANTIAL
11:18AM 17 ISSUES THAT RELATE TO OR MAY RELATE TO THE ISSUES ON APPEAL,
11:18AM 18 AND I WILL CONSIDER THOSE QUESTIONS FOR RELIEF ONLY UPON REMAND
11:18AM 19 TO ME BY THE NINTH CIRCUIT. SO GOOGLE WILL HAVE TO ASK THE
11:18AM 20 NINTH CIRCUIT EITHER FOR THAT RELIEF OR TO LET ME CONSIDER THAT
11:18AM 21 REQUEST.

11:18AM 22 THAT BRINGS US, THEN, TO THE ORIGINAL PENDING MOTION THAT
11:18AM 23 GOOGLE FILED HERE BEFORE ME WHICH WAS FOR RELIEF UNDER THE
11:19AM 24 PRESERVATION PLAN OF TWO KINDS. ONE WAS RELIEF FROM PRESERVING
11:19AM 25 CERTAIN TABLES, [REDACTED] AND ANALYTICS TABLES, [REDACTED] TABLES

11:19AM 1 THAT WERE ALSO THE SUBJECT OF THE MOTION IN THE BROWN CASE AS
19AM 2 WELL AS PERMISSION TO STOP ITS [REDACTED] FIELD PRESERVATION
11:19AM 3 EFFORTS AS ORDERED AS PART OF THE PRESERVATION PLAN.

11:19AM 4 AGAIN, I REVIEW THAT REQUEST WITH THE [REDACTED] FIELD
11:19AM 5 PRESERVATION PLAN, OF COURSE, THE PRESERVATION PLAN TO MY WAY
11:19AM 6 OF THINKING IS THAT IT'S LIKE A SWISS WATCH. IT HAD A LOT OF
11:19AM 7 TIME AND EFFORT INTO EACH AND EVERY ASPECT. WE HAD MULTIPLE
11:19AM 8 HEARINGS IN THIS CASE, MULTIPLE ROUNDS OF BRIEFING, MULTIPLE
11:19AM 9 ROUNDS OF EFFORTS IN FRONT OF THE SPECIAL MASTER IN PUTTING
11:19AM 10 THAT PLAN TOGETHER.

11:19AM 11 I DO APPRECIATE THAT THERE ARE SOME CHANGES IN THE POSTURE
11:20AM 12 OF THE CASE NOW IN LIGHT OF THE ORDER, BUT IT IS NOT CLEAR TO
11:20AM 13 ME WITH REGARDS TO THE IMPACT OF THE [REDACTED] FIELD DATA ON THE
10AM 14 ISSUES THAT ARE ON APPEAL.

11:20AM 15 AND SO I THINK THAT IT MAY, IT MAY PRESENT SUBSTANTIAL
11:20AM 16 ISSUES THAT I WILL CONSIDER ONLY IF REMANDED TO ME BY THE
11:20AM 17 NINTH CIRCUIT.

11:20AM 18 SO FOR THAT PORTION OF THE RELIEF THAT GOOGLE SEEKS,
11:20AM 19 YOU'LL HAVE TO TAKE THAT TO THE NINTH CIRCUIT.

11:20AM 20 MR. SCHAPIRO: MORE PRESUMABLY JUDGE GONZALEZ ROGERS
11:20AM 21 FIRST, IF WE'RE OBJECTING TO YOUR RULING HERE TODAY,
11:20AM 22 YOUR HONOR?

11:20AM 23 THE COURT: THAT'S AN EXCELLENT QUESTION,
11:20AM 24 MR. SCHAPIRO.

11:20AM 25 MR. STRAITE: I'LL GO TAKE A LOOK AT WRIGHT &

11:20AM 1 MILLER.

11:20AM 2 THE COURT: WELL, I'M NOT SURE THAT WRIGHT &
11:21AM 3 MILLER ADDRESSED THAT. AS PHRASED BY THE PARTIES' BRIEFS,
11:21AM 4 THERE'S A PROCESS. YOU CAN GO TO THE FEDERAL RULES FOR AN
11:21AM 5 INDICATIVE RULING BEFORE THE DISTRICT COURT WILL TAKE UP AN
11:21AM 6 ISSUE THAT EITHER IT WOULD GRANT OR IT MAY BE SUBSTANTIALLY
11:21AM 7 RELATED TO THE ISSUES ON APPEAL, AND I THINK THAT GIVEN THE
11:21AM 8 BREADTH AND SCOPE AND THE ROLE OF PRESERVATION OF DATA IN THIS
11:21AM 9 CASE AND WHETHER OR NOT -- YOU KNOW, IF DATA IS NOT PRESERVED,
11:21AM 10 CAN THAT -- AND THE PLAINTIFFS ARE SUCCESSFUL ON APPEAL, CAN
11:21AM 11 THAT BE ADDRESSED AT THAT TIME RAISE ISSUES THAT REQUIRE LEAVE
11:21AM 12 FROM THE NINTH CIRCUIT?

11:21AM 13 MR. SCHAPIRO: SO IF I MAY JUST TAKE TWO MINUTES TO
11:22AM 14 MAKE A RECORD AND RAISE ONE POINT THAT I HOPE TO PERSUADE YOU
11:22AM 15 ON A PIECE OF THIS, YOUR HONOR.

11:22AM 16 THE COURT: YOU MAY, BUT LET ME FINISH.

11:22AM 17 MR. SCHAPIRO: MY APOLOGIES.

11:22AM 18 THE COURT: THAT'S ALL RIGHT. THAT'S ALL RIGHT.

11:22AM 19 AND BECAUSE I WAS ALMOST DONE, WHICH WAS THEN THAT LEAVES
11:22AM 20 US THE ISSUE OF THE TABLES WHICH I DO LOOK TO GOOGLE FOR
11:22AM 21 CONFIRMATION THAT THAT IS AN IDENTICAL ISSUE WITH REGARDS TO
11:22AM 22 WHAT WAS RAISED IN BROWN. I APPRECIATE SOME OF THE SPECIFIC
11:22AM 23 TRANSLATIONS MAY BE DIFFERENT BUT THAT THE ISSUE IS THE SAME.

11:22AM 24 IS THAT RIGHT, MS. TREBICKA?

11:22AM 25 MS. TREBICKA: ALMOST THE SAME. IT IS THE SAME WITH

11:22AM 1 RESPECT TO THE [REDACTED] PIECE, AND WITH RESPECT TO THE
11:22AM 2 ANALYTICS TABLES THERE -- BY CONTRAST TO BROWN, THERE IS NO
11:22AM 3 ANALYTICS DATA THAT IS BEING PRESERVED IN THE [REDACTED] LOGS.

11:23AM 4 LET ME JUST GET TO -- I DON'T WANT TO MISSPEAK, YOUR HONOR.

11:23AM 5 THE ANALYTICS ISSUE HERE -- GIVE ME JUST ONE SECOND -- IS
11:23AM 6 THAT THE ANALYTICS DATA THAT IS BEING PRESERVED IN CALHOUN IS
11:23AM 7 ONLY GAIA KEYED AUTHENTICATED DATA.

11:23AM 8 AND THE ANALYTICS TABLES THAT WE HAVE IDENTIFIED FOR
11:23AM 9 RELIEF ARE BISCOTTI AND DEVICE ID KEY. THEY DO NOT HAVE GAIA
11:24AM 10 IDENTIFIERS.

11:24AM 11 THE COURT: SO THEY DON'T TRANSLATE?

11:24AM 12 MS. TREBICKA: SO THEY ARE NOT USEFUL OR RELEVANT TO
11:24AM 13 READING THE DATA, THE ANALYTICS DATA THAT IS BEING PRESERVED IN
11:24AM 14 CALHOUN.

11:24AM 15 THE COURT: OKAY. WE'LL TAKE THAT UP WHEN WE WORK
11:24AM 16 OUR WAY DOWN TO THE TABLES. THANK YOU FOR IDENTIFYING THE
11:24AM 17 ISSUES.

11:24AM 18 SO MR. SCHAPIRO.

11:24AM 19 MR. SCHAPIRO: THANK YOU, YOUR HONOR.

11:24AM 20 SO FIRST, JUST TO MAKE SURE THAT WE'RE CLEAR ON WHAT OUR
11:24AM 21 POSITION IS ABOUT THE JURISDICTIONAL QUESTION.

11:24AM 22 THE COURT: YES. EXCUSE ME. I JUST DROPPED MY
11:24AM 23 JURISDICTIONAL NOTES, SO HANG ON.

11:24AM 24 (PAUSE IN PROCEEDINGS.)

11:24AM 25 THE COURT: OKAY. MY APOLOGIES.

11:24AM 1 MR. SCHAPIRO: SO IT'S RARE THAT YOU COME ACROSS A
24AM 2 CASE THAT IS ALMOST ON ALL FOURS WHEN YOU HAVE A SITUATION THAT
11:24AM 3 IS AS ODD AS OURS IS, BUT WE BELIEVE THAT THE LORD ABBETT CASE
11:24AM 4 REALLY DOES FIT THE BILL ON THAT, AND THAT IS A CASE WHERE
11:25AM 5 THERE WAS A DISPUTE ABOUT WHETHER TO PRESERVE SOME COMPUTERS
11:25AM 6 THAT ONE PARTY SAID WOULD BE RELEVANT IF THE CASE WERE REMANDED
11:25AM 7 ON APPEAL, AND THE COURT CONSIDERED THAT. AND CONTRARY TO WHAT
11:25AM 8 THE PLAINTIFFS HAVE SAID IN THEIR PAPERS, IT TOOK JURISDICTION
11:25AM 9 AS A THRESHOLD ISSUE FIRST BEFORE MAKING ANY DECISIONS ABOUT
11:25AM 10 THE MERITS. THIS IS IN STAR 2 IN THE WESTLAW VERSION OF THE
11:25AM 11 CASE.

11:25AM 12 THE COURT THERE SAID, "THE ISSUE BEFORE THIS COURT DOES
11:25AM 13 NOT RELATE TO THE MERITS OF THE LAWSUIT. IT PERTAINS SOLELY TO
15AM 14 WHETHER ANY PARTY HAS A DUTY TO CONTINUE TO PRESERVE THE WIND
11:25AM 15 RUSH COMPUTERS PENDING A POTENTIAL TRIAL ON REMAND.

11:25AM 16 "ACCORDINGLY, THIS COURT RETAINS JURISDICTION OVER THE
11:25AM 17 DISPUTE NOTWITHSTANDING LORD ABBETT'S APPEAL."

11:25AM 18 THEN THE COURT THEN SAYS, "TURNING NOW TO THE SUBSTANCE OF
11:25AM 19 THE DISPUTE DOT, DOT, DOT."

11:25AM 20 BUT I THINK REGARDLESS OF WHAT ONE DETERMINES IS TRULY
11:26AM 21 COLLATERAL AND ANCILLARY OR NOT, ONE THING IS FOR SURE AND THAT
11:26AM 22 IS THAT THIS QUESTION OF WHO SHOULD PAY FOR THE PRESERVATION IS
11:26AM 23 AS ANCILLARY AND COLLATERAL AS IT CAN GET. THE ISSUE OF WHO
11:26AM 24 HAS TO PAY FOR THE PRESERVATION IS NOT UP BEFORE THE
11:26AM 25 NINTH CIRCUIT. IT'S NOT GOING TO BE UP BEFORE THE

11:26AM 1 NINTH CIRCUIT.

11:26AM 2 SO I WOULD ASK THAT EVEN IF YOU BELIEVE THAT YOU DO NOT
11:26AM 3 HAVE JURISDICTION TO AUTHORIZE US TO NO LONGER -- TO STOP
11:26AM 4 PRESERVING THIS DATA AFTER HAVING WON THE CASE IN THE DISTRICT
11:26AM 5 COURT, THE BALANCE UNDER RULE 26 HAS SHIFTED SUCH THAT, AND
11:26AM 6 MS. TREBICKA CAN SPEAK ABOUT THE BURDEN MORE, SUCH THAT WE
11:26AM 7 SHOULD AT LEAST NOT HAVE TO PAY FOR IT ANYMORE.

11:26AM 8 AND THE COURT, WE BELIEVE, SURELY HAS JURISDICTION TO
11:26AM 9 DECIDE THAT. THAT IS AN ANCILLARY COLLATERAL MATTER. IT FITS
11:26AM 10 SQUARELY UNDER THE EXCEPTION TO THE RULE BY DIVESTING
11:26AM 11 JURISDICTION.

11:26AM 12 THE COURT: AND I APPRECIATE THAT. THANK YOU,
11:26AM 13 MR. SCHAPIRO.

11:27AM 14 AND I'LL HEAR FROM YOU IN A MOMENT, MR. STRAITE. THE
11:27AM 15 POINTS YOU MAKE ARE POINTS THAT THE COURT HAS GIVEN VERY
11:27AM 16 CAREFUL CONSIDERATION TO WITH REGARDS TO WHETHER IT COULD
11:27AM 17 RETAIN.

11:27AM 18 LET ME START WITH THE LORD ABBETT CASE BECAUSE I OBVIOUSLY
11:27AM 19 LOOKED AT THAT CAREFULLY. THERE'S NOT A LOT OF GUIDANCE IN
11:27AM 20 THIS AREA IN THE NINTH CIRCUIT OR THE NORTHERN DISTRICT, BUT
11:27AM 21 THAT CASE DOES SPEAK TO PRESERVATION OF EVIDENCE. WELL, THE
11:27AM 22 MATTER IS UP ON APPEAL.

11:27AM 23 BUT THERE THE UNDERLYING FACTS ARE -- COULD NOT BE MORE
11:27AM 24 DIFFERENT FROM THIS CASE IN THAT THE COMPUTERS WERE SOMEWHAT --
11:27AM 25 YOU KNOW, THEY WERE THIRD PARTIES, THEY WERE REMOVED, THE

11:27AM 1 LIKELIHOOD OF THOSE COMPUTERS HAVING RELEVANT EVIDENCE WAS
11:28AM 2 SOMETHING THAT THE COURT LOOKED AT AND JUST DID NOT SEE THIS AS
11:28AM 3 A SIGNIFICANT ISSUE OR SUBSTANTIAL ISSUE RELATED IN ANY WAY TO
11:28AM 4 THE APPEAL.

11:28AM 5 IT WAS TALKING ABOUT OBVIOUSLY SHARING THE COSTS, THE
11:28AM 6 WAREHOUSING COSTS, BUT IT WAS A VERY DIFFERENT FACTUAL
11:28AM 7 SITUATION WHERE HERE WE HAVE, WE HAVE THIS VERY INTRICATE AND
11:28AM 8 COMPREHENSIVE PRESERVATION PLAN THAT WAS DESIGNED REALLY TO
11:28AM 9 ADDRESS A NUMBER OF THE ISSUES AND THE EVIDENCE THAT WOULD BE
11:28AM 10 REQUIRED SHOULD THE CASE GO FORWARD.

11:28AM 11 I ALSO LOOKED AT, AND I APPRECIATE GOOGLE'S CONCERNS AND
11:28AM 12 THINKING OF, WELL, OKAY, WE HAVE SUCCEEDED ON SUMMARY JUDGMENT,
11:29AM 13 IT TOOK A LONG TIME, BUT WE DID GET A RULING, AND SO THE CASE
11:29AM 14 IS OVER BUT WE'RE NOT RELIEVED OF THIS PRESERVATION OBLIGATION,
11:29AM 15 OKAY, BUT THERE SHOULD BE COST SHIFTING.

11:29AM 16 AND I GAVE SOME THOUGHT TO THE PROPORTIONALITY. THERE IS
11:29AM 17 AN ARGUMENT THAT THE PROPORTIONALITY ANALYSIS HAS CHANGED, BUT
11:29AM 18 THAT ANALYSIS IS TIED TO SUCCESS ON THE SUMMARY JUDGMENT
11:29AM 19 MOTION. THAT'S WHERE I HAVE A CHALLENGE OF CAN I JUST BACK OUT
11:29AM 20 THE COST ISSUE WHEN THE REASON, THE RATIONALE FOR SHIFTING COST
11:29AM 21 IS -- WELL, THE PROPORTIONS HAVE CHANGED, THE PROPORTIONALITY
11:29AM 22 ANALYSIS HAS CHANGED AND IT HAS CHANGED BECAUSE OF THE RULING
11:30AM 23 ON SUMMARY JUDGMENT WHICH IS EXACTLY WHAT IS ON APPEAL.

11:30AM 24 I WILL PICK IT UP AND I WILL RULE ON IT IF THE
11:30AM 25 NINTH CIRCUIT SAYS THAT THAT'S OKAY.

11:30AM 1 MR. SCHAPIRO: YES. SO YOUR HONOR, I WANT TO BE
30AM 2 CLEAR THAT WE ARE NOT MEANING TO CONFLATE THE QUESTION ABOUT
11:30AM 3 RULE 26 BURDEN WITH THE QUESTION ABOUT JURISDICTION OR WHAT THE
11:30AM 4 NINTH CIRCUIT DOES ON APPEAL.

11:30AM 5 THE FACT IS THAT WE BELIEVE THAT YOU HAVE JURISDICTION TO
11:30AM 6 ASSESS CAUTION, AND I THINK I HEAR YOU SAYING THAT AS WELL. I
11:30AM 7 MIGHT BE WRONG. BUT YOU'RE SAYING THAT YOU'RE NOT SURE IF THE
11:30AM 8 BALANCE HAS CHANGED, AND I'D LIKE TO ADDRESS THAT RIGHT NOW.

11:30AM 9 THE COURT: WELL, I THINK, LET ME JUST -- I BELIEVE
11:30AM 10 THE BALANCE HAS CHANGED, BUT IT HAS CHANGED BECAUSE OF THE
11:30AM 11 RULING THAT IS UP ON APPEAL.

11:30AM 12 MR. SCHAPIRO: YES, BUT RESPECTFULLY, THAT SHOULDN'T
11:31AM 13 MATTER. IT HAS CHANGED BECAUSE IF SOMETHING IS ON THE APPEAL,
31AM 14 BUT THE FACT ON THE GROUND IS THAT THERE IS NOW A MUCH, MUCH,
11:31AM 15 MUCH SMALLER CHANCE THAT THIS EVIDENCE WILL EVER BE RELEVANT OR
11:31AM 16 BE USED. YES, BECAUSE IT'S ON APPEAL, THAT'S FINE. BUT
11:31AM 17 BECAUSE OF THE LIKELIHOOD THAT THIS EVIDENCE WILL EVER BE
11:31AM 18 RELEVANT OR USED IN ANY COURTROOM IS MUCH LESS THAN IT WAS ON
11:31AM 19 DECEMBER 11TH, THE DAY BEFORE THE ORDER WAS ISSUED, THE BALANCE
11:31AM 20 UNDER RULE 26 HAS CHANGED AND WE SHOULD NOT HAVE TO PAY.

11:31AM 21 THE COURT: SO THAT'S AN EXCELLENT POINT, AND THAT'S
11:31AM 22 MY QUESTION IS THAT LIKELIHOOD OF SUCCESS IS NOT A RULE 26
11:31AM 23 FACTOR.

11:31AM 24 I MEAN, I LOOK AT THAT, BUT I KEEP COMING BACK TO THAT
11:31AM 25 IT'S TIED TO BECAUSE OF THE SUMMARY JUDGMENT RULING, BUT I --

11:31AM 1 MR. SCHAPIRO: WELL, BUT I THINK, YOUR HONOR, UNDER
11:31AM 2 RULE 26 ONE OF THE FACTORS IS HOW LIKELY IS IT THAT THIS IS
11:31AM 3 GOING TO BE IMPORTANT EVIDENCE, RIGHT?

11:31AM 4 SO EVEN IF YOU'RE JUST TALKING UNDER RULE 26 ABOUT A
11:31AM 5 REQUEST TO TAKE A DEPOSITION OF SOMEONE OR REVIEW A BUNCH OF
11:32AM 6 DOCUMENTS, AT THE GENERAL LEVEL THE QUESTION IS WHAT IS THE
11:32AM 7 LIKELIHOOD THAT THIS IS GOING TO BE USEFUL AT TRIAL?

11:32AM 8 AND THERE MIGHT BE VARIOUS REASONS WHY DOWN THE ROAD IT
11:32AM 9 WILL OR WON'T BE IMPORTANT AT TRIAL.

11:32AM 10 HERE THE REASON IT'S UNLIKELY TO BE IMPORTANT AT TRIAL IS
11:32AM 11 BECAUSE THEY'RE UNLIKELY TO GET THERE. THAT STILL WEIGHS AS A
11:32AM 12 FACTOR ON THE SCALE.

11:32AM 13 THE COURT: OKAY. I HEAR YOU. I HEAR YOU. THANK
11:32AM 14 YOU.

11:32AM 15 MR. STRAITE, MR. SCHAPIRO PICKS UP A POINT THAT THE COURT
11:32AM 16 HAS ALSO GIVEN A LOT OF THOUGHT AND CONSIDERATION, I'LL EVEN
11:32AM 17 SAY HAS STRUGGLED WITH, WITH REGARDS TO A PURELY COST SHIFTING
11:32AM 18 ANALYSIS AT THIS STAGE WITHOUT REGARD TO, YOU KNOW, ALL OF THE
11:32AM 19 EVIDENCE STAYS, BUT NOW IN LIGHT OF SIGNIFICANT CHANGE IN
11:33AM 20 CIRCUMSTANCES, PLAINTIFFS OUGHT TO BE SHARING IN THAT BURDEN.

11:33AM 21 MR. STRAITE: THANK YOU, YOUR HONOR. WE WOULD AGREE
11:33AM 22 THAT RULE 26 DOES NOT HAVE A MERITS ANALYSIS BAKED INTO THE
11:33AM 23 PROPORTIONALITY TEST.

11:33AM 24 IN THE NINTH CIRCUIT MULTIPLE COURTS HAVE SAID THAT THE
11:33AM 25 ZUBULAKE, Z-U-B, TEST, THE SEVEN PART TEST, WHICH IS THE GOLD

1 STANDARD IN THE NINTH CIRCUIT, IT'S A NEW YORK CASE. IT'S
2 ZUBULAKE VERSUS UBS WARBURG LLC. THERE ARE SEVEN FACTORS AND
3 NONE OF THEM ARE AN ANALYSIS OF CHANCES OF SUCCESS ON THE
4 MERITS.

5 IN FACT, WE HAVE OTHER FACTORS LIKE THE PARTY'S RELATIVE
6 ABILITY TO PAY FOR A PRESERVATION? THAT'S ONE OF THE FACTORS.
7 HOW IMPORTANT THE ISSUES ARE IN LITIGATION? OBVIOUSLY THAT HAS
8 ALREADY BEEN ADDRESSED.

9 GOOGLE HAS STEADFASTLY REFUSED TO ADDRESS THE ZUBULAKE
10 TEST IN ANY OF ITS BRIEFING WHICH IS UNFORTUNATE, BUT RULE 26
11 NOR ZUBULAKE ADDRESS OR ALLOW US TO HANDICAP THE LIKELIHOOD OF
12 SUCCESS ON APPEAL.

13 MORE IMPORTANTLY, HOWEVER, THAT TO THE EXTENT THAT COST
14 SHIFTING WERE APPROPRIATE, IT CAN ONLY BE EVALUATED FAIRLY WITH
15 REOPENING OF DISCOVERY, WHICH YOUR HONOR HAS SAID AND WE'RE
16 GRATEFUL TO HEAR IT, THAT THAT'S NOT IN THE CARDS. IT WOULD BE
17 A SUBSTANTIAL EFFORT TO FIGURE OUT EXACTLY WHAT ARE THE
18 APPROPRIATE OUT-OF-POCKET COSTS ASSOCIATED WITH NON-DUPPLICATIVE
19 DISCOVERY, AND THAT WOULD REQUIRE AN ENORMOUS EFFORT TO EVEN
20 UNDERSTAND WHAT WE'RE TALKING ABOUT. EVEN THE ORDER OF
21 MAGNITUDE HAS CHANGED.

22 THE COURT: I'M GOING TO STOP YOU THERE,
23 MR. STRAITE, BECAUSE I WILL SAY I DON'T AGREE. THAT DOESN'T
24 MEAN THAT THERE WOULDN'T HAVE TO BE SOME EXCHANGE OF
25 INFORMATION OR SOME FURTHER DIGGING OF THE INFORMATION WITH

11:34AM 1

REGARD TO COSTS.

11:34AM 2

MR. STRAITE: RIGHT.

11:34AM 3

THE COURT: BUT WE MAY EVENTUALLY GET THERE IN THIS

11:34AM 4

CASE, AND I'M IMAGINING A SITUATION WHERE THE NINTH CIRCUIT

11:34AM 5

SAYS WHAT ARE YOU TALKING ABOUT? COST SHIFTING ON PRESERVATION

11:34AM 6

OF DISCOVERY, DISTRICT COURT, GO, DO IT.

11:35AM 7

AND THAT'S STILL NOT GOING TO HAVE A REOPENING, CERTAINLY

11:35AM 8

NOT A WHOLESALE REOPENING OF DISCOVERY.

11:35AM 9

MR. STRAITE: AND YOUR HONOR -- THANK YOU,

11:35AM 10

YOUR HONOR.

11:35AM 11

TO THE EXTENT THAT WE'RE TALKING ABOUT WHAT ARE THE COSTS

11:35AM 12

ASSOCIATED WITH NON-DUPPLICATIVE DISCOVERY, THAT'S CERTAINLY A

11:35AM 13

CONVERSATION WE'RE WILLING TO HAVE NOW IF WE WANT. THERE'S

11:35AM 14

NOTHING THAT WOULD PROHIBIT THE PARTIES, IF WE AGREE, TO HAVE A

11:35AM 15

MEET AND CONFER REGARDING THE MAPPING TABLES, FOR EXAMPLE. WE

11:35AM 16

COULD BE APART OF THE CONVERSATIONS WITH THE BROWN TEAM AND OUR

11:35AM 17

EXPERTS.

11:35AM 18

WE HAVE NO INTEREST IN ASKING GOOGLE TO PRESERVE

11:35AM 19

DUPLICATIVE DATA. THERE'S NO REASON FOR THAT. AND IF COSTS

11:35AM 20

COULD BE REDUCED, WE'RE MORE THAN WILLING TO BE APART OF THAT

11:35AM 21

CONVERSATION EVEN DURING APPEAL.

11:35AM 22

THE COURT: ALL RIGHT.

11:35AM 23

MR. SCHAPIRO: YOUR HONOR, THERE'S ONE OTHER THING

11:35AM 24

THAT HAS CHANGED THAT I THINK THE COURT ALSO CAN TAKE INTO

11:35AM 25

ACCOUNT SEPARATE FROM THE FACT THAT THE ODDS ARE VERY LOW THAT

11:35AM 1 THIS EVIDENCE WOULD EVER BE USEFUL. BY THE WAY, I'M SURE
11:36AM 2 MR. STRAITE MISSPOKE, BUT WE DID ADDRESS ZUBULAKE IN OUR REPLY
11:36AM 3 BRIEF.

11:36AM 4 YOUR HONOR, THE OTHER THING THAT HAS CHANGED NOW IS THAT
11:36AM 5 NOW WE'RE LOOKING AT A PERIOD, A SUBSTANTIALLY LONGER PERIOD
11:36AM 6 THAN ANYONE MIGHT HAVE ANTICIPATED FOR THE RETENTION OF THIS
11:36AM 7 DATA WHERE THE METER IS RUNNING ON THE COST OF THAT. WE
11:36AM 8 BELIEVE THAT THAT IS ALSO SOMETHING NOW THAT DUE TO THESE
11:36AM 9 CHANGED CIRCUMSTANCES THE COURT CAN LOOK AT.

11:36AM 10 THE COURT: UH-HUH.

11:36AM 11 MR. SCHAPIRO: IN TERMS OF JUST THE BASIC UNFAIRNESS
11:36AM 12 AND PERHAPS SLIGHT FRUSTRATION, WE FEEL ABOUT THE
11:36AM 13 CIRCUMSTANCES, YOUR HONOR, WE BELIEVE THAT YOUR HONOR WOULD
11:36AM 14 HAVE GRANTED AT LEAST IN PART OUR MOTION AS IT WAS ORIGINALLY
11:36AM 15 FILED BECAUSE WE THINK THERE'S A LOT OF MERIT TO IT, BUT
11:36AM 16 BECAUSE OF THE INTERVENING FACTOR THAT WE WON THE CASE BEFORE
11:36AM 17 THERE COULD BE A RULING ON IT, SUDDENLY WE'RE STUCK, AND WE
11:36AM 18 CAN'T GET A RESOLUTION ON THAT MERITORIOUS MOTION.

11:36AM 19 SO YOU CAN UNDERSTAND WHERE WE'RE FEELING LIKE WAIT A
11:36AM 20 MINUTE, WE HAD A GOOD MOTION, WE THINK WE WOULD HAVE WON IT,
11:37AM 21 AND BEFORE YOU GOT -- WE HAD A CHANCE TO HAVE IT FULLY BRIEFED
11:37AM 22 AND ARGUED, WE WIN THE CASE AND NOW WE HAVE TO, YOU KNOW, PAY
11:37AM 23 THESE COSTS FOR TWO YEARS OR SO. I'M SURE YOU UNDERSTAND.

11:37AM 24 THE COURT: I DO UNDERSTAND. AND WHEN I FEEL THAT
11:37AM 25 HOW DO WE FIND OUR WAY FORWARD, I PICK UP THE RULE BOOK AND I

11:37AM 1 LOOK AT THE RULES. AND I THINK THAT FOR THE ISSUES I'VE
37AM 2 IDENTIFIED AND FOR THE REASONS THAT I'VE IDENTIFIED, I WILL
11:37AM 3 PICK UP AND I WILL RULE ON THESE ISSUES, AND I'M EXCLUDING THE
11:37AM 4 TABLE ISSUE BECAUSE I THINK THAT IS WELL WITHIN MY
11:37AM 5 PURVIEW.

11:37AM 6 BUT WITH REGARDS TO CONTINUED PRESERVATION OF SIGNIFICANT,
11:37AM 7 SIGNIFICANT PORTIONS OF THE DATA, THAT IS EITHER ALL OF IT
11:37AM 8 GOING -- YOU KNOW, STOP COLLECTING IT GOING FORWARD, NOT HAVE
11:37AM 9 TO PRESERVE WHAT IS HERE OR WHAT HAS ALREADY BEEN CORRECTED,
11:38AM 10 REMOVING A SIGNIFICANT PIECE OF THE UNDERLYING PRESERVATION
11:38AM 11 PLAN IN TERMS OF THE [REDACTED] FIELD PRESERVATION, THOSE ARE --
11:38AM 12 THOSE PIECES ARE QUITE LARGE AND I WILL TAKE THEM UP. IF THE
11:38AM 13 NINTH CIRCUIT SAYS THAT THAT'S OKAY, IF IT AGREES THAT, YOU
8AM 14 KNOW, THEN WE'RE DOWN TO THE LORD ABBETT CASE AND OTHERS AND
11:38AM 15 WE'LL GO FROM THERE, BUT I WANT TO HEAR FROM THE NINTH CIRCUIT
11:38AM 16 THAT THAT'S OKAY.

11:38AM 17 THE COST SHIFTING IS A PIECE I DISCUSSED AT LENGTH AND
11:38AM 18 WORKED THROUGH AND EVALUATED AT LENGTH, I'LL SAY, WITH REGARDS
11:39AM 19 TO WHETHER I COULD STILL DEAL WITH COSTS, BUT I DON'T SEE IN
11:39AM 20 RULE 26 A PATH TO CONSIDER AND WEIGH THE LIKELIHOOD OF SUCCESS.
11:39AM 21 AND, FRANKLY, THAT DOESN'T SURPRISE ME BECAUSE LIKELIHOOD OF
11:39AM 22 SUCCESS IS SQUARELY -- THAT PUTS US SQUARELY IN THE ISSUES
11:39AM 23 BEFORE THE NINTH CIRCUIT.

11:39AM 24 SO THOSE ISSUES, AGAIN, I WILL TAKE UP WITH PERMISSION
11:39AM 25 FROM THE NINTH CIRCUIT. AND IF YOU BELIEVE IT IS APPROPRIATE

11:39AM 1 TO ASK JUDGE GONZALEZ ROGERS FIRST, I LEAVE THAT TO YOUR
11:39AM 2 CAREFUL ANALYSIS AS TO WHAT THE NEXT STOP IS.

11:39AM 3 AND THAT BRINGS US DOWN TO THE TABLES ISSUE, AND THE
11:39AM 4 TABLES THAT GOOGLE IS SEEKING RELIEF FROM NOT HAVING TO
11:40AM 5 PRESERVE AND FOR THE SAME REASON -- AND I'M GOING TO COME TO
11:40AM 6 THE DIFFERENT POINT THAT MS. TREBICKA IDENTIFIED A MOMENT AGO,
11:40AM 7 BUT BECAUSE THAT IS ADDRESSING SQUARELY ARE THESE TABLES NEEDED
11:40AM 8 AS ARTICULATED IN MY PRESERVATION ORDER, AND THERE IS
11:40AM 9 ADDITIONAL EVIDENCE NOW WITH REGARDS TO NEED THAT HAS BEEN
11:40AM 10 DEVELOPED AS PART OF THE IMPLEMENTATION OF THE PRESERVATION
11:40AM 11 PLAN, THAT THAT IS PROPERLY BEFORE ME, AND I CAN TAKE THAT UP
11:40AM 12 AND RULE ON IT HERE AND NOW WITHOUT INPUT FROM THE
11:40AM 13 NINTH CIRCUIT.

11:40AM 14 SO WITH THAT, MS. TREBICKA, LET'S GO BACK TO THE TABLES
11:40AM 15 ISSUE AS WE SPENT SOME TIME WORKING THROUGH IT IN BROWN IS NOT
11:41AM 16 IDENTICAL TO THE ISSUE HERE, SPECIFICALLY WITH REGARDS TO THE
11:41AM 17 ANALYTICS TABLES.

11:41AM 18 SO YOU WERE GOING TO TAKE ME THROUGH THAT. SO PLEASE.

11:41AM 19 MS. TREBICKA: YES, YOUR HONOR.

11:41AM 20 [REDACTED] IS IDENTICAL, THE [REDACTED] PIECE.

11:41AM 21 THE COURT: UH-HUH.

11:41AM 22 MS. TREBICKA: WHERE IT IS NOT IDENTICAL IS WITH
11:41AM 23 RESPECT TO THE ANALYTICS TABLES WHERE THE ONLY DATA SOURCES IN
11:41AM 24 THE PRESERVATION ORDER FOR CALHOUN THAT RELATES TO GOOGLE
11:41AM 25 ANALYTICS ARE IN GAIA [REDACTED] AND IN [REDACTED] AND BOTH OF

11:41AM 1 THOSE SOURCES ARE AUTHENTICATED. SO GAIA PAID, GAIA [REDACTED] AND
11:41AM 2 THEN [REDACTED] THE AUTHENTICATED SOURCE, AND BECAUSE THEY DO
11:41AM 3 NOT CONTAIN -- THEY ARE NOT KEY TO BISCOTTI, SO UNAUTHENTICATED
11:41AM 4 IDENTIFIERS. THE IDENTIFIERS THAT ARE MAPPED IN THE ANALYTICS
11:41AM 5 MAPPING TABLES ARE INAPPLICABLE TO THESE PRESERVED DATA
11:42AM 6 SOURCES, AND, THEREFORE, UNNECESSARY TO READ THE DATA OR
11:42AM 7 UNDERSTAND THE DATA.

11:42AM 8 THE COURT: SO WHAT IS IT IN THE ANALYTICS TABLES
11:42AM 9 THAT MAKE -- THAT CAUSES THEM TO FALL UNDER MY ORDER?

11:42AM 10 MS. TREBICKA: IT IS -- GREAT QUESTION, YOUR HONOR.

11:42AM 11 AGAIN, PART OF THE REASON THAT WE HAD A LONG DISCUSSION OF
11:42AM 12 HOW WE HAVE IMPLEMENTED YOUR ORDER WAS BECAUSE WE WANTED TO BE
11:42AM 13 ABSOLUTELY CLEAR THAT WE WERE DOING WHAT YOU ASKED US TO DO.

11:42AM 14 IT IS NOT THAT THESE TABLES ARE NOT NECESSARY TO READ THE
11:42AM 15 DATA, BUT WE WERE CONCERNED BY THE ORDER THAT SAID -- OR BY THE
11:42AM 16 LANGUAGE INSTRUCTING ALL MEANS ALL, AND IN THE INTEREST OF
11:42AM 17 TRANSPARENCY, IN THE INTEREST OF NOT STEPPING WRONGLY BEFORE
11:42AM 18 YOUR HONOR, WE WANTED TO IDENTIFY THEM, AND ALSO BECAUSE THEY
11:42AM 19 HAVE BEEN IDENTIFIED IN BROWN, AND BRING THIS TO YOUR HONOR'S
11:43AM 20 ATTENTION.

11:43AM 21 BUT CLEARLY THEY ARE NOT NECESSARY TO READ THE DATA IN
11:43AM 22 CALHOUN.

11:43AM 23 THE COURT: WELL, I MADE IT CLEAR IN MY ORDER THAT
11:43AM 24 IF THE DATA IN THE TABLE WAS UNRELATED TO THE DATA IDENTIFIED
11:43AM 25 AND PRODUCED IN THE ACTION, THEN THAT TABLE DID NOT NEED TO BE

11:43AM 1 PRODUCED OR PRESERVED, EXCUSE ME. BUT THAT DOESN'T, THAT
11:43AM 2 DOESN'T SOUND LIKE THIS IS A SITUATION WHERE THE ANALYTICS
11:43AM 3 TABLES ARE COMPLETELY UNRELATED TO THE DATA THAT HAS BEEN
11:43AM 4 IDENTIFIED OR PRODUCED.

11:43AM 5 MS. TREBICKA: THEY ARE ANALYTICS TABLES, SO IN THAT
11:43AM 6 RESPECT, YES, THEY ALL DEAL WITH GOOGLE ANALYTICS DATA, BUT
11:43AM 7 THEY ARE NOT RELATED TO THE DATA THAT IS BEING PRESERVED IN THE
11:44AM 8 SENSE OF BEING NECESSARY TO READ OR INTERPRET OR LINK THE DATA
11:44AM 9 THAT IS BEING PRESERVED.

11:44AM 10 SO FROM OUR PERSPECTIVE THEY'RE UNNECESSARY. THEY DO NOT
11:44AM 11 FALL WITHIN YOUR ORDER. THEY'RE UNNECESSARY.

11:44AM 12 BUT AS I SAID A MOMENT AGO, YOUR HONOR, WE DID NOT WANT TO
11:44AM 13 MISSTEP. WE IDENTIFIED IT. WE WANTED YOUR HONOR TO BE AWARE
11:44AM 14 OF IT, SO ONCE IT APPEARS IN BROWN OR IS MADE AWARE IN BROWN,
11:44AM 15 WE ARE NOT, AS GOOGLE AND COUNSEL TO GOOGLE SECOND GUESS ABOUT
11:44AM 16 SOME DECISIONS THAT WE HAVE MADE TO DATE, ESPECIALLY SINCE
11:44AM 17 THESE CASES HAVE BEEN PROCEEDING IN PARALLEL.

11:44AM 18 BUT, AGAIN, WE DON'T THINK THAT THESE MAPPING TABLES APPLY
11:44AM 19 TO THE DATA THAT IS BEING PRESERVED IN CALHOUN, THE GOOGLE
11:44AM 20 ANALYTICS DATA THAT IS BEING PRESERVED IN CALHOUN.

11:44AM 21 THE COURT: OKAY.

11:44AM 22 MR. STRAITE.

11:44AM 23 MR. STRAITE: THANK YOU, YOUR HONOR.

11:44AM 24 TWO QUICK THINGS. WE DON'T KNOW WHAT IS IN SOME OF THESE
11:44AM 25 MAPPING TABLES, SO WHEN GOOGLE COUNSEL SAYS THAT THE MAPPING

11:45AM 1 TABLES DON'T RELATE TO [REDACTED] OR OTHER DATA SOURCES BEING
11:45AM 2 PRESERVED, WE HAVE NO WAY TO EVALUATE THAT. WE HAVEN'T SEEN
11:45AM 3 THEM. WE DON'T KNOW WHAT IS BEING PRESERVED.

11:45AM 4 SO WE HAVE NO INTEREST. CERTAINLY WE HAVE NO DESIRE FOR
11:45AM 5 GOOGLE TO PRESERVE TABLES OR DATA THAT IS LITERALLY UNRELATED
11:45AM 6 TO THIS ACTION AND ARE UNNECESSARY AND ARE DUPLICATIVE.

11:45AM 7 SO WE WOULD ONLY ASK FOR TRANSPARENCY AND AN OPPORTUNITY
11:45AM 8 TO HAVE A CONVERSATION WITH GOOGLE AND OUR EXPERTS TO DETERMINE
11:45AM 9 WHAT IS IN THESE TABLES AND WHAT ARE THEY MAPPING TO.

11:45AM 10 SO MAPPING TABLES MAP GAIA TO WHAT? WE DON'T KNOW WHAT IS
11:45AM 11 IN THE MAPPING TABLES. WE'RE OBVIOUSLY A BIT IN THE DARK. WE
11:45AM 12 WOULD JUST ASK FOR AN OPPORTUNITY TO MEET WITH GOOGLE TO
11:45AM 13 DETERMINE WHAT IS IN THE TABLES THAT THEY'RE PROPOSING THAT
11:45AM 14 THEY BE RELIEVED FROM THE OBLIGATION TO PRESERVE. IF THEY'RE
11:45AM 15 DUPLICATIVE OR TRULY NOT RELATED TO THE CASE, OF COURSE WE HAVE
11:45AM 16 NO OBJECTION. WE HAVE NO BASIS TO SAY ONE WAY OR THE OTHER
11:46AM 17 UNTIL WE MEET AND CONFER WITH THEM.

11:46AM 18 THE COURT: OKAY. WELL, HERE'S A CONCERN I HAVE, IN
11:46AM 19 LIGHT OF THE INFORMATION THAT MS. TREBICKA HAS LAID OUT MORE
11:46AM 20 CLEARLY FOR ME HERE ON THE RECORD, WHICH IS THAT TO HAVE A
11:46AM 21 CONVERSATION, AND WE'RE JUST TALKING ABOUT THE ANALYTICS TABLES
11:46AM 22 NOW BECAUSE I THINK ON THE [REDACTED] PIECE IT CAN MIRROR
11:46AM 23 THE PROCESS THAT WE DISCUSSED IN BROWN. BUT WITH REGARDS TO
11:46AM 24 THE ANALYTICS PIECE, DID I HEAR GOOGLE SAYING THAT THERE'S
11:46AM 25 NOTHING IN THESE TABLES THAT REFLECTS WHAT LINK OR COULD BE

11:46AM 1 DERIVED FROM THE TABLES THAT ARE BEING FROM THE PRESERVED DATA.
11:46AM 2 THEY DON'T SHED ANY INFORMATION. SO TO HAVE THAT DISCUSSION --
11:46AM 3 WHAT I'M TRYING TO AVOID, MR. STRAITE, IS I'VE ALREADY SAID
11:47AM 4 THAT GOOGLE DOESN'T HAVE TO, YOU KNOW, THEY DON'T HAVE TO MAKE
11:47AM 5 THE ENTIRE TABLES. I MEAN, ALL OF THIS INFORMATION AVAILABLE.
11:47AM 6 THIS IS NOT AN OPEN IT ALL UP AND HAVE THE PLAINTIFFS LOOK
11:47AM 7 AROUND AND SEE IF THERE'S ANYTHING THAT RELATES. THAT'S NOT
11:47AM 8 THE PROCESS.

11:47AM 9 AND IN BROWN WE WERE ABLE TO START WITH, WELL, HERE ARE
11:47AM 10 THE PIECES THAT GOOGLE SAYS RELATE. DO THEY RELATE IN THE WAY
11:47AM 11 THAT GOOGLE SAID THEY DO? IT'S A LITTLE BIT HARDER. I'M NOT
11:47AM 12 QUITE SURE, BUT I'M WILLING TO LEAVE IT TO THE PARTIES TO
11:47AM 13 FIGURE OUT A WAY TO HAVE THAT DISCUSSION, BUT SIMPLY OPEN UP
11:47AM 14 AND SHOW US EVERYTHING IN THE TABLES IS CERTAINLY NOT WHERE
11:47AM 15 WE'RE GOING TO START.

11:47AM 16 MR. STRAITE: AND WE CAN ABSOLUTELY AGREE TO THAT.
11:47AM 17 WE DON'T HAVE TO HAVE ALL OF THE TABLES COMPLETELY OPEN, BUT IF
11:47AM 18 WE HAVE SUFFICIENT INFORMATION TO UNDERSTAND WHAT IS GAIA ID
11:47AM 19 MAP TO? WE HEARD THAT ANALYTICS TABLES DON'T REVEAL ANY NEW
11:48AM 20 INFORMATION THAT IS NOT ALREADY IN SAY, FOR EXAMPLE, BUT WHAT
11:48AM 21 ABOUT [REDACTED]? THERE ARE A LOT OF QUESTIONS THAT WOULDN'T
11:48AM 22 REQUIRE THAT WE HAVE COMPLETE ACCESS TO EVERYTHING, BUT WE DO
11:48AM 23 NEED ADDITIONAL INFORMATION TO UNDERSTAND WHAT ARE THE DETAILS
11:48AM 24 OF GOOGLE'S ARGUMENT? WE'RE WILLING TO HAVE THOSE
11:48AM 25 CONVERSATIONS.

11:50AM 1 MR. STRAITE: YES, YOUR HONOR, THAT SCHEDULE WORKS
10AM 2 FINE. IT'S OUR EXPECTATION THAT THE MEET AND CONFERS WOULD BE
11:50AM 3 JOINTLY WITH GOOGLE AND BROWN COUNSEL SO THAT WE'RE NOT HAVING,
11:50AM 4 YOU KNOW, TELEPHONE CONVERSATIONS. YES, THAT SCHEDULE MAKES
11:50AM 5 SENSE FOR US.

11:50AM 6 THE COURT: OKAY. AND THIS HAS TO MOVE FORWARD
11:50AM 7 EXPEDITIOUSLY TO GET THIS ISSUE ADDRESSED.

11:50AM 8 BEFORE WE WRAP UP, I HAD A QUESTION. I WANTED TO
11:50AM 9 UNDERSTAND, JUST BRIEFLY, MS. TREBICKA, THE DATA RETENTION
11:51AM 10 INFORMATION AND APPROXIMATE COST INFORMATION THAT GOOGLE
11:51AM 11 PROVIDED, AND I'M -- I AGREE, WE'LL PROCEED AS WITH BROWN, BUT
11:51AM 12 I WANTED TO BE SURE THAT I WAS UNDERSTANDING THE INFORMATION
11:51AM 13 THAT GOOGLE HAD PROVIDED TO THE COURT SO FAR IN ITS
11AM 14 SUPPLEMENTAL BRIEFING WHERE IT HAD -- I'M LOOKING AT DOCUMENT
11:51AM 15 NUMBER 929-3 WHERE IT HAD THE FIELD PRESERVATION NUMBERS AND
11:51AM 16 THEN THE NUMBER FOR ALL OTHER PRESERVATION TASKS EXCLUDING
11:51AM 17 RELIEF SOUGHT.

11:51AM 18 MS. TREBICKA: YES, YOUR HONOR.

11:51AM 19 THE COURT: DO YOU SEE WHERE I AM?

11:51AM 20 MS. TREBICKA: I SEE IT. I ACTUALLY HAVE A HANDY
11:51AM 21 TABLE THAT WE CAN SHARE SCREEN. WOULD THAT BE OKAY?

11:52AM 22 SETH, DO YOU MIND?

11:52AM 23 IS IT OKAY TO SHARE, YOUR HONOR?

11:52AM 24 THE COURT: WELL, LET ME ASK YOU A QUESTION FIRST
11:52AM 25 BECAUSE THAT'S WHAT I'M LOOKING AT IS DOCKET 929.

11:52AM 1 MS. TREBICKA: DOCUMENT 929.

11:52AM 2 THE COURT: TAB 2.

11:52AM 3 MS. TREBICKA: TAB 2, YES.

11:52AM 4 THE COURT: AND LOOKING FIRST AT THE DATA THAT IS

11:52AM 5 PRESERVED. SO GOOGLE BROKE OUT THE [REDACTED] FIELD BASE

11:52AM 6 PRESERVATION.

11:52AM 7 MS. TREBICKA: YES.

11:52AM 8 THE COURT: THAT'S PART OF ITS REQUEST FOR RELIEF.

11:52AM 9 AND THEN ALL OTHER PRESERVATION TASKS, EXCLUDING RELIEF

11:52AM 10 SOUGHT, WHICH I ASSUME EXCLUDES THE MAPPING AND LINKING TABLES.

11:52AM 11 MS. TREBICKA: YES, IT DOES.

11:52AM 12 THE COURT: OKAY.

11:52AM 13 MS. TREBICKA: I WAS JUST GOING TO CONFIRM. I DON'T

11:52AM 14 HAVE 929 RIGHT IN FRONT OF ME. MAYBE SETH CAN GET IT TO ME.

11:52AM 15 WHAT WE HAVE IS IN CALHOUN IS ALL OTHER PRESERVATION TASKS

11:52AM 16 EXCLUDING RELIEF SOUGHT IN THE FIRST YEAR IS A LITTLE OVER

11:53AM 17 [REDACTED].

11:53AM 18 THE COURT: UH-HUH.

11:53AM 19 MS. TREBICKA: AND THEN IT GROWS EXPONENTIALLY TO

11:53AM 20 [REDACTED] AFTER TWO YEARS AND TO JUST OVER [REDACTED] AFTER

11:53AM 21 THREE YEARS.

11:53AM 22 THE COURT: RIGHT. BUT THAT'S ALL PRESERVATION

11:53AM 23 TASKS EXCLUDING [REDACTED] FIELD AND THE MAPPING TABLES.

11:53AM 24 MS. TREBICKA: CORRECT, YOUR HONOR.

11:53AM 25 THE COURT: OKAY.

11:53AM 1 AND THERE WASN'T A BREAKOUT OF THE MAPPING TABLE COSTS.

11:53AM 2 WOULD THAT TRACK -- THAT TABLE IS IN THE BROWN BRIEFS.

11:53AM 3 DOES THAT TRACK -- THAT WAS THE APPROXIMATELY -- I CAN'T

11:53AM 4 REMEMBER THE PETABYTES, BUT I KNOW IT WAS THE [REDACTED] OVER

11:53AM 5 THREE YEARS.

11:53AM 6 MS. TREBICKA: YES, YOUR HONOR, AND IT IS 897-3F10

11:53AM 7 AND IT APPLIES TO BOTH BROWN AND CALHOUN. WE ALSO HAVE IT

11:53AM 8 BROKEN OUT BY [REDACTED] AND ANALYTICS, BUT IT IS

11:54AM 9 [REDACTED] IN THE FIRST YEAR, [REDACTED] AFTER TWO YEARS, AND

11:54AM 10 [REDACTED] AFTER THREE YEARS.

11:54AM 11 THE COURT: RIGHT. OKAY. I JUST WANTED TO BE SURE

11:54AM 12 THAT WE WERE TALKING ABOUT THE SAME NUMBERS THAT THEY WERE --

11:54AM 13 NOT ALL OF THE PIECES WERE IN BOTH SETS OF TABLES

11:54AM 14 UNDERSTANDABLY.

11:54AM 15 MS. TREBICKA: YES, YOUR HONOR.

11:54AM 16 AND AS FAR AS [REDACTED] PRESERVATION OR OUR RELIEF FROM THE

11:54AM 17 [REDACTED] FIELD-BASED PRESERVATION, MS. GAO WAS READY AND PREPARED

11:54AM 18 TO ADDRESS THAT. I DON'T KNOW IF YOUR HONOR HAS ANY QUESTIONS

11:54AM 19 FOR US ON THAT POINT BEFORE WE CONCLUDE TODAY. I UNDERSTAND

11:54AM 20 YOUR RULING ON JURISDICTION, BUT AT ANY RATE I WANTED TO MAKE

11:54AM 21 SURE THAT IF THERE ARE ANY LINGERING QUESTIONS, MS. GAO IS HERE

11:54AM 22 TO ADDRESS THEM.

11:54AM 23 THE COURT: THANK YOU.

11:54AM 24 MR. STRAITE, BEFORE I RESPOND TO THAT.

11:54AM 25 MR. STRAITE: THANK YOU, YOUR HONOR.

1 MS. TREBICKA REFERENCED IN THE BROWN DOCKET,
2 DOCUMENT 897-3. THOSE WERE DOCUMENTS WHERE THESE DOLLAR
3 FIGURES APPEAR, THEY WERE FILED UNDER SEAL, AND WE NEVER GOT
4 COPIES OF THEM. I'M ASKING FOR A COURTESY COPY OF THE SEALED
5 VERSION OF THE DOCUMENTS REFERENCED TODAY.

6 THE COURT: I WOULD ASSUME THAT THAT IS ALL RIGHT.

7 MS. TREBICKA: ABSOLUTELY.

8 THE COURT: BUT THAT IS GOOGLE INFORMATION. SO TO
9 THE EXTENT THAT THERE IS INFORMATION AND THAT IT'S NOT EXACTLY
10 DUPLICATED AS BETWEEN THE BROWN AND CALHOUN CASES, AND I'M
11 THINKING OF THE SUPPORTING TECHNICAL DECLARATIONS AS WELL
12 PROVIDE THOSE TO THE PLAINTIFFS IN CALHOUN.

13 MS. TREBICKA: WE WILL DO THAT, YOUR HONOR.

14 THE TECHNICAL DECLARATION, SO THE UNDERLYING EVIDENCE IS
15 THE SAME IN BOTH CASES, BUT WE MAY HAVE PRESENTED IT SLIGHTLY
16 DIFFERENT IN THE MOTION, AND, THEREFORE, THESE NUMBERS, THE
17 AGGREGATED NUMBERS MAY HAVE BEEN SLIGHTLY DIFFERENT.

18 BUT, MR. STRAITE, WE WILL ABSOLUTELY GET THAT OVER TO YOU.

19 THE COURT: I JUST WANT TO BE SURE EVERYBODY, WHEN
20 YOU'RE GOING TO MEET AND CONFER AND THESE EFFORTS ARE GOING
21 FORWARD JOINTLY IN THE CALHOUN AND BROWN CASE, THAT EVERYBODY
22 HAS SEEN THE SAME INFORMATION.

23 I APPRECIATE AT LEAST AS TO THE ANALYTICS TABLE THE
24 SITUATION IS A LITTLE BIT DIFFERENT, BUT LET'S GET EVERYTHING
25 OUT ON THE TABLE.

11:56AM 1 I APPRECIATE MS. GAO'S PREPARATION FOR THE [REDACTED]
11:56AM 2 FIELD-BASED PRESERVATION, AND I LOOK FORWARD TO HEARING THAT AS
11:56AM 3 SOON AS THE NINTH CIRCUIT TELLS ME THAT I CAN, IF AND WHEN.
11:56AM 4 OKAY. ANY OTHER -- ANYTHING ELSE ON THIS FOR TODAY? I
11:56AM 5 WILL WRITE UP AN ORDER SUMMARIZING THE RULINGS WITH REGARDS TO
11:57AM 6 THE ISSUES THAT I BELIEVE NEED TO BE DETERMINED BY THE
11:57AM 7 NINTH CIRCUIT, REMANDED TO ME BY THE NINTH CIRCUIT. SO YOU'LL
11:57AM 8 HAVE THAT ORDER.
11:57AM 9 ANYTHING FURTHER, MS. TREBICKA?
11:57AM 10 MS. TREBICKA: NOT FROM OUR SIDE, YOUR HONOR.
11:57AM 11 THE COURT: MR. STRAITE?
11:57AM 12 MR. STRAITE: NO, YOUR HONOR. THANK YOU FOR YOUR
11:57AM 13 TIME ON THIS.
11:57AM 14 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.
11:57AM 15 I APPRECIATE, AS ALWAYS, COUNSEL'S CAREFUL PREPARATION OF
11:57AM 16 THE BRIEFS. AND I'LL GET THOSE ORDERS OUT, AND I WILL SEE YOU
11:57AM 17 NEXT TIME. AND I LOOK FORWARD TO THOSE STATUS REPORTS IN
11:57AM 18 21 DAYS. THANK YOU.
11:57AM 19 MS. TREBICKA: THANK YOU, YOUR HONOR.
11:57AM 20 MR. STRAITE: THANK YOU, YOUR HONOR.
11:57AM 21 THE COURT: THAT CONCLUDES THIS MATTER. THE
11:57AM 22 TRANSCRIPTS CAN BE RELEASED TO THE PARTIES.
11:57AM 23 WE ARE ADJOURNED. THANK YOU.
11:57AM 24 MR. SCHAPIRO: THANK YOU, JUDGE.
11:57AM 25 MS. TREBICKA: THANK YOU, YOUR HONOR.

11:57AM

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(COURT CONCLUDED AT 11:57 A.M.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO
HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: JANUARY 12, 2023